

FILED
BILLINGS DIV.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

PATRICK E. DUFFY, CLERK

BY

DEPUTY CLERK

LLOYD SCOTT MAIER,)
) **Cause No. CV-11-79-BLG-RFC-CSO**
 Petitioner,)
)
 v.) **ORDER ADOPTING FINDINGS**
) **AND RECOMMENDATIONS OF**
 WARDEN MIKE MAHONEY;) **U.S. MAGISTRATE JUDGE**
 ATTORNEY GENERAL OF THE)
 STATE OF MONTANA,)
)
 Respondents.)
 _____)

United States Magistrate Judge Carolyn Ostby has entered Findings and Recommendation (*doc. 5*) with respect to Rule 4¹ prescreening Maier's 28 U.S.C. § 2254 petition for writ of habeas corpus. *Doc. 4*. Although Judge Ostby notes that the petition would be denied on its merits because even if his juvenile felony conviction was incorrectly counted, he still had two prior felony convictions and persistent felony offender status only required one, she recommends the petition

¹Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts require this Court to summarily dismiss § 2254 petitions without an answer if it "plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court."

be dismissed for lack of jurisdiction as an unauthorized second or successive petition. Judge Ostby further recommends a certificate of appealability be denied.

Upon service of a magistrate judge's findings and recommendation, a party has 14 days to file written objections. 28 U.S.C. § 636(b)(1). Maier has filed timely objections. *Doc. 6*. Accordingly, the Court must make a *de novo* determination of those portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 636(b)(1).

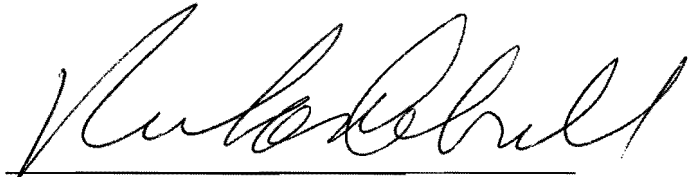
Maier claims this third petition should not be dismissed as an unauthorized petition because he has newly discovered evidence that a juvenile conviction was unlawfully used to designate him as a persistent felony offender. But even if his realization that the juvenile conviction was counted against him during his sentencing could be considered newly discovered evidence, nothing would change because, as noted by Judge Ostby, a persistent felony offender under Montana law need only have one prior felony within five years, *doc. 5, p. 3*, and Maier admits he had two others.

Magistrate Judge Ostby's findings and recommendations are well-grounded in law and fact and are adopted in their entirety. Accordingly, **IT IS HEREBY ORDERED** that Maier's petition (*doc. 4*) is **DISMISSED** for lack of jurisdiction as an unauthorized second or successive petition. A certificate of appealability is

DENIED.

The Clerk of Court is directed to enter, by separate document, a judgment of dismissal.

DATED this 26 ~~th~~ day of August, 2011.

A handwritten signature in black ink, appearing to read "Richard F. Cebull", written over a horizontal line.

RICHARD F. CEBULL
UNITED STATES DISTRICT JUDGE